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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. HUNG PHI NGUYEN, Defendant and Appellant.	C085182 (Super. Ct. No. 95F05136)

After almost 17 years on the run, defendant Hung Phi Nguyen was arrested in Arizona for crimes arising from two 1995 shooting incidents in California. A jury subsequently found defendant guilty of two murders and four attempted murders arising from those incidents. On appeal, defendant contends the trial court abused its discretion by failing to grant his four motions to relieve his attorney and appoint new counsel under *People v. Marsden* (1970) 2 Cal.3d 118. Defendant further argues the jury instructions given by the trial court were erroneous on two grounds: (1) CALCRIM No. 401 failed to inform the jury clearly and unequivocally that aiding and abetting murder and attempted

murder required proof defendant acted with the specific intent to kill; and (2) CALCRIM No. 401 and the other instructions failed to inform the jury that guilt as an aider and abettor of first degree murder required proof he premeditated and deliberated the killing that was aided and abetted. He also argues the trial court prejudicially erred in failing to instruct the jury sua sponte on the lesser included offense of second degree murder on the theory that the murders were a natural and probable consequence of aiding and abetting felony assault or simple assault. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We refer to the two 1995 shooting incidents as the North Highlands shooting and the Lemon Hill shooting for purposes of clarity. The attempted murders of Duong Phan and Thang Bui relate to the North Highlands shooting and the murders of Ri Nguyen (Ri)[1] and Say Ngo and the attempted murders of Mark Huang and San Vong relate to the Lemon Hill shooting.

I

The North Highlands Shooting

A

Prosecution

On May 17, 1995, Bui and Phan followed defendant to a party. Bui was driving Phan's car and Phan was in the passenger seat. A couple of cars with individuals known to defendant followed behind Phan's car. The cars stopped at a park, where defendant told Bui and the individuals in the cars behind him to wait. Defendant went into an apartment and returned with another man. Defendant then told Bui to follow him down the block, which Bui did with the other cars in tow. When they stopped the second time, defendant got out of his car and briefly spoke to Bui before walking around the back of

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[1] We use the deceased's first name to avoid confusion due to the common last name Nguyen. No disrespect is intended.

Phan's car to join his friend standing on the passenger side. Bui suddenly heard a gunshot and saw a hand inside the passenger window aiming and shooting at him. Because his car was blocked in, Bui had to put the car in reverse and hit the car behind him to escape.

A few blocks away, Bui saw a police car. He pulled over and asked the officers to call an ambulance because both he and Phan had been shot by defendant. Bui later identified defendant as the shooter from a photo lineup; however, during his trial testimony, Bui acknowledged he was not sure which of the two men had shot them because he could not see the shooter's face.

B

Defense

Defendant was the sole witness called in defense. Defendant testified Phan called him to ask if he could obtain drugs for Phan and Bui. Phan and Bui met defendant at the restaurant where defendant was working as a cook. Defendant got in their car and directed them to an apartment where defendant knew someone who sold drugs. Defendant went to the apartment but the person did not have drugs to sell; the person said, however, he would make a call. Defendant then returned to the car to wait.

Approximately 20 minutes later, defendant went to the apartment to check on the status. He was in the apartment for about 10 to 15 minutes because the dealer was waiting for a reply. When defendant went to check in with Phan and Bui, he realized they had left and he had to walk back to work. Defendant denied any knowledge of a shooting and said he did not have a gun that night.

II

The Lemon Hill Shooting

A

Prosecution

Eight men, including defendant, his brother Hung Tien Nguyen (Hung Tien),[2] and Tien Duc Tran, went to an apartment complex in two cars on June 27, 1995.[3] Defendant and Tran got out and walked into the complex to collect "protection money" from someone. According to Hung Tien, defendant and Tran were extorting people and specifically targeting Ngo, who ran a gambling business at one of the apartments in the complex.

Defendant and Tran were gone only a few minutes. When they returned to the cars, the group drove to a coffee shop. Approximately 20 minutes later, Tran or defendant received a phone call, and Tran said, "let's go." The group drove back to the apartment complex.

Defendant, Tran, and Hung Tien (each of them armed with a gun) got out and walked into the apartment complex toward a group of men. Tran and a man later identified as Ri got into an argument about gambling and collecting money. A minute later, Tran and defendant shot Ri,[4] and Hung Tien shot Ngo, Huang, and Vong. No evidence was presented indicating anyone other than defendant, Hung Tien, and Tran fired a weapon.

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[2] We refer to Hung Tien Nguyen as Hung Tien to avoid confusion regarding the common last name Nguyen. No disrespect is intended.

[3] Hung Tien and Tran were convicted of crimes arising from this incident in 1996.

[4] Hung Tien initially testified he did not see defendant shoot anyone. After lunch, Hung Tien changed his testimony and admitted he saw defendant shoot Ri.

The three men ran back to the two parked cars, and the group fled the scene. After the shooting, defendant told a friend "he shot the dude 'cuz he was gonna take over the business."

The prosecution presented evidence that, shortly before the shooting, Tran and another man (presumably defendant)[5] went to Ngo's apartment and "asked for 250 a week." Ngo said he was already giving "Ri a hundred dollars a week," to which Tran responded, "forget Ri now, I'm taking over Sacramento." Tran told Ngo to call him when Ri showed up. Ngo did as requested -- he called Tran when Ri came to the apartment asking for money approximately 20 minutes later. The shooting occurred when Tran returned.

B

Defense

Defendant testified he met Tran about six months before the shooting and they became friends. Tran worked for Kinyo Abao as security for his gambling operation at his apartment. Defendant was interested in doing Tran's job because he made $250 or more per week.

On the day of the shooting, defendant and a group of friends drove over to the Lemon Hill apartments in two cars to pick up Tran's paycheck. He went to the apartment with Tran. Tran spoke to Abao, who defendant later learned was Ngo's father, and received money from him. They left and both cars drove to a coffee shop. Later, Tran said he got a phone call and needed to go back to the apartment to remove a drug addict because he was bothering the people gambling there. The group returned to the apartment complex.

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5 See defendant's testimony below.

Tran, defendant, and Hung Tien went to the apartment. Defendant went because he wanted to see how Tran did his job. Defendant did not see anyone with a gun and he did not have a gun. Outside the apartment, defendant saw someone looking like a "dope fiend," who he later learned was Ri.

Tran told Ri to leave and Ri responded he was waiting to see if anyone was winning so they would give him money. Tran got upset and Ri moved his hand back to try to sit up. Hung Tien pulled out a gun and shot Ri; then Tran pulled out a gun and shot Ri as well. Defendant was surprised by the shootings. He did not see the shootings of Ngo, Vong, or Huang because he fled.

The three men ran back to the cars and the group left. Defendant left Sacramento for Arizona the next day.

III

The Verdicts

North Highlands shooting: The jury found defendant guilty of the attempted murders of Phan and Bui and found not true the allegations that he "personally used a firearm, to wit, a handgun" in committing those crimes or that he personally inflicted great bodily injury upon them.

Lemon Hill shooting: The jury found defendant guilty of the first degree murders of Ri and Ngo and found true the allegation that he "personally used a firearm, to wit, a handgun" in committing those crimes. The jury further found true the special circumstance that defendant "committed multiple murders." The jury also found defendant guilty of the attempted murders of Huang and Vong, and found true the allegation that he "personally used a firearm, to wit, a handgun" in committing those crimes, but found not true the great bodily injury allegations.

DISCUSSION

I

The Jury Instruction Contentions

A

The Instructions Given Were Proper

Defendant argues the standard language of CALCRIM No. 401 failed to inform the jury clearly and unequivocally of the specific intent required for a conviction of murder and attempted murder under an aiding and abetting theory, and the instructions given failed to properly inform the jury regarding the requirement of premeditation and deliberation of first degree murder under an aiding and abetting theory.

Defendant concedes he did not object to CALCRIM No. 401 or the other instructions at trial, nor did he request a clarification of the instructions; and the People contend the alleged errors were, therefore, waived or forfeited. Defendant asserts the arguments were not waived or forfeited because the instructions amounted to incorrect statements of law and the instructional errors affected his substantial rights.

" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation.] But that rule does not apply when . . . the trial court gives an instruction that is an incorrect statement of the law." (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012.) Additionally, "we may review any instruction which affects the defendant's 'substantial rights,' with or without a trial objection. [Citation.] 'Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim -- at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was.' " (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087.)

We "determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of the adequacy of

instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." ' " (*People v. Ramos, supra,* 163 Cal.App.4th at p. 1088.)[6]

1

The Instructions

Pertinent to defendant's contentions, the trial court instructed the jury with CALCRIM Nos. 400, 401, 252, 520, and 521.

CALCRIM No. 400 explained a person can be guilty of a crime either as a perpetrator who committed the crime directly or as an aider and abettor.

CALCRIM No. 401 defined the elements of aiding and abetting, reading in pertinent part:

"To prove that the defendant is guilty of a crime on aiding and abetting that crime, the People must prove that: [¶] The perpetrator committed the crime; [¶] The defendant knew that the perpetrator intended to commit the crime; [¶] Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

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6 We do not address defendant's alternative argument that, "if counsel's action or inaction waived or forfeited any claim of error, ineffective assistance of counsel resulted" because we address his contentions on the merits.

CALCRIM No. 252 stated the crimes of murder, voluntary manslaughter, attempted murder, and attempted voluntary manslaughter require a specific intent and/or mental state, while the use of a firearm and infliction of great bodily injury requires only general criminal intent. "For you to find a person guilty of these crimes, that person must not only intentionally commit the prohibited act or intentionally fail to do the required act, but must do so with a specific intent."

CALCRIM No. 520 instructed first degree and second degree murder requires malice aforethought and defined express and implied malice. Express malice was defined as: "The defendant acted with express *malice* if he unlawfully intended to kill." Implied malice was defined as: "The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life." The instruction further read: "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM 521."

CALCRIM No. 521 read: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted *willfully* if he intended to kill. The defendant acted *deliberately* if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with *premeditation* if he decided to kill before completing the act that caused death. [¶] . . . [¶] The requirements for 2nd degree murder based on express or implied malice are explained in CALCRIM 520, First or Second Degree Murder With Malice Aforethought."

In giving the CALCRIM Nos. 520 and 521 instructions, the trial court explained defendant was charged with the crime of murder (and manslaughter is a lesser offense to

murder) and "[t]he People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime" and, "[i]f the People have not met this burden you must find the defendant not guilty of first degree murder, and the murder is second degree murder."

2

CALCRIM No. 401 Properly Informed The Jury Of The Requisite Specific Intent

Defendant contends CALCRIM No. 401 "was deficient in failing to inform the jury clearly and unequivocally that aiding and abetting murder and attempted murder requires proof that the alleged aider and abettor acted with the specific intent to kill." He argues "[t]he flaw is that CALCRIM [No.] 401 fails adequately to express the requirement that the aider and abettor specifically intended 'the additional criminal act the perpetrator commits.' " We disagree.

In *People v. Beeman* (1984) 35 Cal.3d 547, our Supreme Court held an aider and abettor of a specific intent crime shares the perpetrator's specific intent when he or she knows the perpetrator's criminal purpose and aids or encourages the perpetrator with the intent or purpose of facilitating the commission of the crime. (*Id.* at p. 560.) The court explained: "By 'share' we mean neither that the aider and abettor must be prepared to commit the offense by his or her own act should the perpetrator fail to do so, nor that the aider and abettor must seek to share the fruits of the crime." (*Ibid.*) The court concluded: "[A]n appropriate instruction should inform the jury that a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*Id.* at p. 561.)

Beeman's definition of aiding and abetting, and what it means to share the perpetrator's specific intent, has repeatedly been approved, and CALCRIM No. 401 adequately conveys those principles because the instruction tracks the language in

Beeman. (*People v. Houston* (2012) 54 Cal.4th 1186, 1224; *People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

"CALCRIM No. 401 clearly provides that knowledge that the perpetrator intends to commit the crime is only one of the four elements for aiding and abetting liability. If the jury found mere knowledge alone, by the terms of CALCRIM No. 401, that would be insufficient to establish aiding and abetting liability. This point is even emphasized by the portion of the instruction that reads as follows: 'Someone *aids* and *abets* a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.' " (*People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1103.) That language was included in the CALCRIM No. 401 instruction given in this case.

Defendant argues *Beeman* left confusion "as to precisely what one must intend in order to be derivatively liable for a crime committed by another," and two cases -- *People v. Mendoza* (1998) 18 Cal.4th 1114 and *People v. Lee* (2003) 31 Cal.4th 613 -- provided clarification "that an alleged aider and abettor must be shown to have had a specific intent to assist the direct perpetrator in the commission of the charged crime." Defendant is mistaken.

In *Mendoza*, our Supreme Court considered whether former "[Penal Code] section 22 permits defendants tried as aiders and abettors to present, and the jury to consider, evidence of intoxication on the question whether they had the requisite mental states of knowledge and intent." (*People v. Mendoza*, *supra*, 18 Cal.4th at p. 1126.) The court explained "[t]he mental state necessary for conviction as an aider and abettor . . . is different from the mental state necessary for conviction as the actual perpetrator. [¶] The actual perpetrator must have whatever mental state is required for each crime charged . . . . An aider and abettor, on the other hand, must 'act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] The jury must find

'the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense . . . .' " (*Id.* at pp. 1122-1123.) Nothing in *Mendoza* states an aider and abettor must harbor the same specific intent as the direct perpetrator.

Lee does not help defendant either. There, after approvingly quoting *Beeman*'s language regarding an aider and abettor's shared intent *ante*, our Supreme Court said: "Thus, to be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing -- which means that the person guilty of attempted murder as an aider and abettor must intend to kill." (*People v. Lee, supra,* 31 Cal.4th at p. 624.) Defendant argues, through this explanatory statement, our Supreme Court "affirmed that, in order to be guilty of aiding and abetting a crime which has as an intent-to-kill element, the aider and abettor must personally intend to kill." Not so. Context is important, and we reject defendant's request to read the sentence in isolation.

In the next paragraph, our Supreme Court explained: "In light of the foregoing, we conclude that the Legislature reasonably could have determined that an attempted murderer who is guilty as an aider and abettor, but who did not personally act with willfulness, deliberation, and premeditation, is sufficiently blameworthy to be punished with life imprisonment. Where, as in the present case, the natural-and-probable-consequences doctrine does not apply, *such an attempted murderer necessarily acts willfully, that is with intent to kill*. In addition, he or she also necessarily acts with a mental state at least approaching deliberation and premeditation -- concepts that entail ' " 'careful thought and weighing of considerations' " ' and ' " 'preexisting reflection' " ' [citation], as opposed to 'mere unconsidered or rash impulse hastily executed' [citation] -- because he or she necessarily acts with knowledge of the direct perpetrator's intent to

kill and with a purpose of facilitating the direct perpetrator's accomplishment of the intended killing." (*People v. Lee*, *supra*, 31 Cal.4th at p. 624, italics added.)

Reading the sentence relied upon by defendant in context with the *Beeman* quote preceding it and the explanation following it, *Lee* merely reaffirmed the formulation of the intent necessary to establish aiding and abetting as stated in *Beeman* and incorporated in CALCRIM No. 401. *Lee* did not change the law. Accordingly, CALCRIM No. 401 was a correct statement of the law and we find no error.

3

The Instructions Properly Defined The Requirements Of Premeditation And Deliberation Under The Aiding And Abetting Theory

Defendant believes the jury found him guilty of the first degree murders of Ri and Ngo based on his role as an aider and abettor and contends the instructions given failed to inform the jury that, "for conviction of first degree malice-murder as an aider and abettor," the jury had to find defendant personally premeditated and deliberated the murders. Defendant appears to argue the instructions created confusion by failing to explain the particular crime, degrees, and requisite specific intent *within* CALCRIM No. 401, because no instruction told the jury that the premeditation and deliberation specific intent requirement outlined in CALCRIM No. 520 also applied to aiding and abetting under CALCRIM No. 401. According to defendant, the jury could have, therefore, found him guilty of first degree murder without finding that he *personally* acted with the malice or premeditated, deliberate intent to kill.

The problem with defendant's argument is that, "in determining the correctness of jury instructions, we consider the instructions as a whole." (*People v. Friend* (2009) 47 Cal.4th 1, 49.) We reject defendant's narrow and isolated reading of CALCRIM No. 401 and review the adequacy of the instructions in light of the entire charge to the jury. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.)

Defendant does not argue that CALCRIM No. 521 contained an incorrect statement of the law. When we consider the CALCRIM No. 521 instruction given in conjunction with the other instructions, we conclude the instructions did not permit the jury to find defendant guilty of first degree murder based merely on a finding that the direct perpetrator committed first degree murder. CALCRIM No. 400 informed the jury that a person could be guilty of a crime as an aider and abettor. CALCRIM No. 520 informed the jury that the charged crime was murder, and CALCRIM No. 521 specified that *defendant* was charged with first degree murder and that "defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately and with premeditation." CALCRIM No. 401 informed the jury that in order to find defendant guilty as an aider and abettor, defendant had to know that the direct perpetrator intended to commit "the crime" -- i.e., first degree murder -- and had to intend to aid and abet the commission of "the crime."

CALCRIM No. 401 clearly explained the aider and abettor's required mental state, and CALCRIM Nos. 520 and 521 explained the elements of first degree and second degree murder and the requisite mental states for those crimes. Considered together, the instructions adequately informed the jury that, to find defendant guilty of first degree murder, it had to find defendant personally harbored the mental states of premeditation and deliberation. Specifically, the instructions directed the jury that it could find defendant guilty of first degree murder on an aiding and abetting theory only if the jury found defendant "knew that the direct perpetrator intended to commit" first degree murder, that defendant "intended to aid and abet" the direct perpetrator in committing first degree murder, and that defendant "did in fact aid and abet the perpetrator's commission of" first degree murder.[7] This is sufficient. We must presume the jurors

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[7] We note, in any event, the evidence of planning activity (arming himself before heading to the apartment), preexisting motive (defendant intending to "take over" the

were able to correlate the relevant instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

Defendant's reliance on *People v. McCoy* (2001) 25 Cal.4th 1111 and *People v. Chiu* (2014) 59 Cal.4th 155 for statements of law regarding the specific intent required under aiding and abetting principles does not alter our analysis. Neither case addressed the adequacy of the instructions given here and defendant fails to explain how *McCoy* or *Chiu* furthers his argument in that regard.

As the instructions given were correct in law and responsive to the evidence, the trial court had no duty to give additional clarifying or amplifying instructions absent a request. (*People v. Mayfield* (1997) 14 Cal.4th 668, 778.) Thus, defendant should have requested any clarification, different language, or additional pinpoint instructions he deemed necessary.

B

The Evidence Did Not Support Defendant's

Proposed Lesser Included Offense Instruction

Defendant asserts our Supreme Court in *Chiu* created "the new, potential, lesser included offense of second degree murder based on aiding and abetting a lesser crime where murder resulted as a natural and probable consequence" and "the prosecution is pursuing a first degree murder verdict," which was implemented by the new CALJIC No. 8.34.1 instruction.[8] He argues the trial court erred in failing to instruct the jury sua

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gambling business), and the manner of killing provided overwhelming evidence of premeditation and deliberation. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069; see *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224-1225.)

8 CALJIC No. 8.34.1 provides: "An aider and abettor of [a person] [persons] who commit[s] [an] offense[s] other than murder, which crime[s] produce[s] as a natural and probable consequence a murder of another, whether premeditated or unpremeditated, is subject to liability for the crime of second degree murder." (CALJIC No. 8.34.1 (Fall ed. 2016), at p. 637.)

sponte on the lesser included offense of second degree murder based on the "natural and probable consequences doctrine with felony assault and simple assault as the 'target crimes,' and with second degree murder as the 'consequence' " with respect "to both the homicide of Say Ngo and the homicide of Ri Nguyen."

The People contend defendant forfeited the claim for failing to request an instruction on the natural and probable consequences doctrine at trial and, even if not forfeited, the claim lacks merit because "there was no evidence that [defendant] acted without malice when he shot and killed Ri Nguyen and killed or aided in killing Say Ngo."

The trial court's duty to instruct on the "natural and probable consequences doctrine" does not arise in every aider and abettor liability case. Generally, the duty to instruct on lesser included offenses, or a theory thereof, arises only if there is substantial evidence to support the instruction. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 [every lesser included offense, or theory thereof, supported by the evidence must be presented to the jury]; *People v. Barton* (1995) 12 Cal.4th 186, 203 [trial court must instruct on lesser included offenses supported by substantial evidence].) With respect to a trial court's duty to sua sponte instruct on aider and abettor liability under the "natural and probable consequences" theory -- a variation of which defendant seeks to apply here -- our Supreme Court has identified additional requirements.

In *Prettyman*, our Supreme Court said the duty to sua sponte instruct on an aider and abettor's liability under the natural and probable consequences theory is quite limited. "It arises only when the prosecution has elected to *rely* on the 'natural and probable consequences' theory of accomplice liability and the trial court has determined that the evidence will support instructions on that theory. The trial court, moreover, need not identify *all* potential target offenses supported by the evidence, but only those that the prosecution wishes the jury to consider." (*People v. Prettyman, supra,* 14 Cal.4th at p. 269.)

There are two problems with defendant's argument. First, defendant waived the argument by failing to cite evidence in the record to support his claim that felony assault and simple assault were the "target crimes" and "his intent had been to assault but not to kill Ri Nguyen." (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; Cal. Rules of Court, rule 8.204(a)(1)(C).) Indeed, defendant's *entire* argument that the evidence required an instruction on the proposed lesser included charge is stated in one sentence, as follows, without any citation to the record: "While the prosecutor argued to the jury that [defendant] had gone to the Lemon Hill apartments with an intention to kill Ri Nguyen, the evidence more logically supports the view that [defendant's] intent in going there was to threaten and/or assault Ri Nguyen."[9] Our independent review of the record also reveals no evidence, much less substantial evidence, to support the proposed lesser included offense instruction defendant seeks.

Second, the prosecutor did not rely on the natural and probable consequences doctrine and, therefore, the trial court was under no duty to sua sponte instruct the jury on it. (See *People v. Prettyman*, *supra*, 14 Cal.4th at p. 269.) Indeed, defendant acknowledges "the prosecutor argued to the jury that [defendant] had gone to the Lemon Hill apartments with an intention to kill Ri." That defendant believes "the evidence more logically supports the view that [his] intent in going there was to threaten and/or assault Ri Nguyen" does not carry the day.

Moreover, any error was harmless under either standard. (See *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705]; *People v. Watson* (1956) 46 Cal.2d

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[9] In reply to the People's argument that defendant failed to show substantial evidence supporting a duty to sua sponte instruct on the proposed lesser included offense, defendant merely refers us back to this singular sentence without citing any evidence in support.

818.) The jury was instructed on first degree murder, second degree murder, and voluntary manslaughter, and found defendant guilty of first degree murder, i.e., that he had committed the murders with malice. (See *People v. Cook* (2006) 39 Cal.4th 566, 597.) We can therefore determine, beyond a reasonable doubt, that the jury would have rejected second degree murder under the natural and probable consequences theory had it been instructed on that offense as well. (See *ibid.*; see also *People v. Rogers* (2006) 39 Cal.4th 826, 884.)

II

The Marsden Error Contention

A

The Hearings

1

Marsden One And The Request For A Trial Continuance

The first *Marsden* hearing was held on February 7, 2014, before Judge John P. Winn. Prior to the closed hearing, defendant's counsel, Jennifer Mouzis, requested a trial continuance due to her existing trial schedule. She explained she was engaged in a jury trial expected to last several months and was preassigned to trial in another case thereafter. Mouzis was requesting a good cause continuance because defendant was unwilling to waive time. Defendant said he wanted to file a motion, which Mouzis clarified was a *Marsden* motion.

During the *Marsden* hearing, Judge Winn asked defendant to explain "the situation" with his attorney. Defendant responded it was "a lot of things," like they "never sit down and talk." He continued: "The whole time I ask for speedy trial, like anything. But I been sitting in here almost two years." Judge Winn sought to clarify: "So you just haven't had enough time with your attorney?" Defendant responded: "It's a lot of things. A lot of things. We have problems. I can't set down and discuss anything. Please, sir, get me representation."

Judge Winn asked Mouzis whether she wanted to respond. She did, "[o]nly briefly," to explain she had met and spent time with defendant on several occasions. She added: "And with the exception of yesterday, I have never left before I have answered all questions and fully discussed his case. . . . [¶] That does include yesterday, however, Mr. Nguyen kept returning to a subject we had fully discussed. I was unwilling to continue discussing the same subject over and over. I think that speaks for itself."

Judge Winn asked defendant whether there was anything else he wanted to say. Defendant responded that Mouzis was lying -- "we have some big problem." When Judge Winn asked defendant whether it was "[m]ore of just a personality" issue, he said yes. Turning to Mouzis, Judge Winn asked whether she felt she could effectively and vigorously represent defendant, and she responded in the affirmative. Mouzis added they had had a good relationship until the day before when "he became upset about waiving his preliminary hearing previously."

Judge Winn next asked Mouzis whether she had gone through all of the transcripts. Mouzis responded she had, but explained the complexities and confusion associated with witnesses having multiple Vietnamese and American names. Although her work had "been somewhat hampered by [defendant] for various reasons," Mouzis believed she could continue to mount a vigorous defense on defendant's behalf.

Defendant disagreed with Mouzis, arguing her statements were "not true" and stating he had asked her to perform investigations into witnesses because he "want[ed] to know where all of his witnesses are at and everything," which she had failed to do. Defendant added he did not trust Mouzis and believed she was lying to him.

Judge Winn asked Mouzis whether there were difficulties in locating witnesses. Mouzis responded there were initial difficulties because some witnesses had died and others had been deported, however, over time they had found witnesses. She continued that she believed defendant had an unusual interest in the exact location of the witnesses that made her uncomfortable.

Judge Winn told defendant: "So, Mr. Nguyen, in your case I can understand why you're frustrated but you've got a very experienced attorney representing you." Defendant cut in: "Sir, I have a big problem with this. I asked for a motion to dismiss. I asked for a lot of things. It's never happened. It's not happening. It's not working." Judge Winn asked Mouzis whether there was a motion to dismiss pending. She responded there were no good faith bases to file a motion to dismiss.

Judge Winn found no grounds for granting defendant's *Marden* motion. Defendant responded he "can't deal with her" and was frustrated with the delay in getting to trial. Defendant said: "I go two years; I asked for speedy trial. I asked for everything. She take seventeen months to get my full discovery. It takes twenty-two months and not ready for speedy trial, anything. I don't think it's going to work, sir. Please represent me another separate representation." Judge Winn denied the motion.

After concluding the *Marsden* hearing, Judge Winn resumed the proceeding to consider Mouzis's request to continue the jury trial to April 17, 2014. Mouzis reiterated her two trial conflicts. The prosecutor said: "I would just state for the record that the People are ready on this trial. I have no objection to the continuance. I believe Ms. Mouzis does have good cause." Judge Winn found good cause to continue the trial, noting he understood defendant's frustration in wanting to get to trial.

2

Defendant's Self-Representation

On April 11, 2014, Judge Winn held a trial readiness conference and considered defendant's self-representation motion under *Faretta v. California* (1975) 422 U.S. 806 [45 L.Ed.2d 562]. Mouzis told the court the case had in excess of 5,000 pages of discovery. When Judge Winn expressed concern about defendant's self-representation request and the potential language barrier, defendant said: "It's just I been waiting for a long time, but I can't do it no more. I wait for two years. I waited to ask for speedy trial, and they refused to give me discovery for 18 months to get me my full discovery, and I

need that. [¶] I need to ask for speedy trial. I'm not waiting. I understand she need her time to read, but it's not years. I mean, it's just too much going on, and it's -- just I cannot do it."

Judge Winn asked Mouzis: "Regarding -- if you're going to represent the defendant, when would you be able to effectively represent your client in a jury trial?" Mouzis responded she would "not be ready to try this case until the end of June" because she was "currently engaged in a murder trial" and had "eight or nine other homicide trials, some of which [we]re older than [defendant's] and [we]re ready for trial." She explained she "would need at least a month or two more to go through [defendant's] case" due to the number of pages of discovery and complexities involving witness names, with the caveat that she would also have to review the discovery from the trial of Hung Tien and Tran. The prosecutor commented: "it's 5,000 pages of discovery, plus probably another 5,000 pages of trial transcripts and interview transcripts." Mouzis added there were also poor-quality videotapes containing hours of interviews that were hard to hear and difficult to get through. Judge Winn continued the hearing on defendant's *Faretta* motion to consider the language-barrier concern and whether defendant's request was equivocal. Defendant waived time to continue the trial.

On April 25, 2014, Judge Winn granted defendant's *Faretta* motion. At that hearing and at several subsequent hearings, defendant agreed to waive time regarding the resetting of his jury trial. During his self-representation, defendant told Judge Winn he would be willing to have an attorney appointed, but not his "old attorney" because "she lied," told him he would be convicted, and "was someone who did not help [him]." Judge Winn explained the conflict criminal defenders' panel would likely reappoint Mouzis, but that he would notify the panel of defendant's willingness to accept other counsel.

On April 29, 2015, defendant requested to withdraw from self-representation and have counsel appointed. Judge Michael G. Bowman, explained that, while he was

appointing "the panel," the panel would likely reappoint Mouzis to represent defendant. Defendant said he "w[ould] never go to trial with her." Judge Bowman said, if Mouzis was reappointed, defendant would have avenues to address his concerns at that time.

3

Marsden Two

On May 8, 2015, at the first hearing following Mouzis' reappointment as defendant's counsel, defendant requested a *Marsden* hearing. The *Marsden* hearing was held before Judge Bowman on June 12, 2015.

Judge Bowman noted defendant had previously brought a *Marsden* motion with respect to Mouzis that was denied by Judge Winn, defendant thereafter represented himself until he sought reappointment of counsel, and Mouzis had only been reappointed for a short period of time when defendant requested the hearing. In that regard, although Judge Bowman had received and read defendant's motion,[10] he asked defendant to identify the grounds for the motion based on new circumstances that occurred after the previously denied *Marsden* motion. Judge Bowman explained this was necessary because "the other disagreements that [defendant] had with [Mouzis] ha[d] already been resolved by Judge Winn," and Judge Bowman did not want to relitigate things already decided. Judge Bowman asked: "If there are new things that you want to bring up and address, I'm listening. [¶] What did you want to tell me?"

Defendant said: "He thinks she is not my attorney by that time I represent myself in pro per, so I work just by myself." Judge Bowman reiterated that, although defendant had "a right to bring a *Marsden* motion if [he] ha[d] grounds to do so," he could not relitigate the grounds raised before Judge Winn. (Italics added.) Defendant responded that Mouzis had been "representing [him] like for almost two years" and said: "A lot of

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10 We are unable to locate a copy of the referenced motion in the record on appeal.

things I want her to do, like motions and things like that, and I want to say things to the parties that she did not do at all."

Judge Bowman said he appreciated that defendant was faced with serious charges and wished to take an active role in his case, but explained that Mouzis was generally in charge of the tactical decisions for trial, including decisions about which motions to file and which witnesses to call. Judge Bowman further said: "Ms. Mouzis, though, I've known her 15-plus years. Very experienced defense attorney. I actually went against her when I was a defense attorney and she was a prosecutor. And I know her to be very experienced and very hard working and very well thought of in the community."

Judge Bowman asked defendant: "Anything else you want to tell me, sir?" Defendant responded: "Like this case I need to interview witnesses. [¶] The second part that I have been in jail like two years now. And then I ask her that have like a speedy trial for me in 60 days. She did not do it." Judge Bowman said he could address that concern when they went back into open session, adding: "If you want to have your trial within 60 days, we'll set a jury trial within 60 days. That's not a problem."

Defendant then said he had filed a complaint against Mouzis with the California State Bar Association, which created a conflict between himself and Mouzis. Judge Bowman responded: "I appreciate your thought on that, but here's the situation. If I relieved every attorney simply because a defendant filed a State Bar complaint against them, there would be no reason to even have *Marsden* motions. You just simply file a complaint, that attorney would be fired. If you didn't like that next attorney, you'd file another complaint, and you'd go on and on. [¶] Now, it's a different situation, I suppose, if the State Bar actually, after investigation, decides that your complaint has merit and she's disciplined. Then I would say there was perhaps a conflict of interest." (Italics added.)

Judge Bowman turned to Mouzis and asked: "What's the status of this case? Is it set for trial?" Mouzis responded that the case was not set for trial and the case had

serious witness issues and required significant investigation. She explained: "Towards that end, I've already visited with [defendant] since my re-appointment. I've written him a letter regarding the status of his case. I've met with the investigator, who's present here, what investigation was done while I was not in the case so that we could plan on how to move forward in the case. And I'm making my first appearance. And I'm starting to review the discovery as well as I understand there were a lot of motions filed. A lot has happened since I was relieved. So, in other words, I'm trying to catch up."

Mouzis added: "I'm not sure I understand much of what's in this motion, but I will say that I personally have no conflict whatsoever with representing Mr. Nguyen. [¶] I've not been contacted by an investigator for the State Bar. I would be happy to talk to them when they call. I feel very confident I have given him in the past and present not only effective but very good representation and legal advice in this case. [¶] And I don't take any insult from the idea that he would make a complaint because I think this process is confusing to people. And I don't think they always understand. So I personally don't have any sort of conflict or ill-will towards Mr. Nguyen, and I'm willing to fully defend his case."

Judge Bowman denied the *Marsden* motion, stating: "I believe she's working in your best interests, and I have all the faith that she'll work hard for your case." Defendant responded: "Your Honor, she's a very good attorney. She's worked for me like the last two years. But when I request her to do things for me, she didn't do it. [¶] And can she demonstrate for me what she was doing the last two years?" Judge Bowman said he believed Mouzis would.

In open session, defendant agreed to waive time on the trial continuance.

4

Marsden Three

The third *Marsden* hearing was held on June 9, 2016, before Judge Jaime R. Roman. Defendant filed a written motion, indicating the following grounds for seeking to relieve Mouzis as his counsel:

(1) "failed and/or refused to confer with declarant concerning the preparation of declarant's defense" -- "My lawyer never willing to sit down and talk with me about how we plan to defense on trial, to be prepare, and get ready for trial. Everytime I ask her she always give me a false promise. I'm not talking about one or two times, but at least 30 times. She told me, 'we not going to win this case.' It is so obvious that in her mind I'm already guilty -- that what she told me. That's why she never come and confer about how my trial defense would be."

(2) "failed and/or refused to communicate with declarant" -- "The only time she came to see me always one day before the court day. All those visits just about what that court about. All those visits and discussions have nothing to do about my trial defense or what type of motion we need to file or any witness we need to interview or what investigation need to be done. In fact, every time I brought up these subjects she start to get mad at me, and this is exactly what she said to me: 'Do I have any thing new to say beside this,' and then she stood up and left."

(3) "failed and/or refused to perform and/or to have performed investigation(s) critical and necessary to the defense" -- "All these past years my former private investigator cannot completed all the investigation that need to be done because of my lawyer. She repeatedly prevented my private investigator to do his job by failed to submit paper to the court for more funds so my private investigator can go do what need to be done, such as to locate the witnesses and interviewing them and to obtain more evidences so we can be able to prepare for trial. All these witnesses and evidences are very important to my trial defense. This can be verified and confirmed by calling my

private investigator to testify on the stand. Even my private investigator told me that my lawyer is not acting on my best interest, and she repeatedly prevented my former private investigator to sufficiently doing his job, which lead to multiple disagreement among themselves. That's why my lawyer doesn't want my former private investigator, Terry, in my case no more. Now, with this new private investigator just assigned about two months ago by the court knew nothing about my case and has done nothing at all. So how can I go to trial with them. There is no way for me to go to trial with my current lawyer, who has been betrayed me all these past years, and who already has her mind made-up that I'm guilty with all these alleged crimes charged against me."

(4) "failed and/or refused to prepare and file motion(s) critical to the defense" -- "My current lawyer has been represented me almost 5 years now. She has done nothing about the witnesses and evidences that I need to locate for my trial defense or to file any motion. The court's record will reflect that she has not file even one simple motion on my behalf, such as a simple discovery motion regarding 'Brady,' 'Giglio' and 'Henthorn' materials which I have to file it by myself, and she is representing me in 4 cases. There are two very important motions I need her to file, which I repeatedly asked her to do it: (1) motion to dismiss the charges based on the prosecutor's destruction of the crucial evidence -- the three alleged murder weapons (guns). I has repeatedly asked her file that motion for almost 2 years now. She repeatedly promised me, but never came throught. The lose of these alleged murder weapons (guns) is extremely effect and hurt my trial defense. Now, there is no way for the defense to determine, whether the bullets that caused the injury on the victims came from these guns, and to impreach the prosecutor's witnesses, who alleged these guns were used in the alleged crimes charged in this case, without the physical access to these alleged murder weapons for the defense's gun analysis expert to examination. These purportly destruction/lose of these alleged evidence -- murder weapons -- by the government in its possession clearly violated my

due process and fair trial rights; and (2) the motion is to dismiss the two attempted murder charges base on the lack of evidences."

During the hearing, Judge Roman noted he had not seen or read defendant's motion (questioning whether it was filed) and asked defendant: "What is the issue that you have with regard to your attorney?" Defendant said Mouzis failed to interview witnesses or inspect evidence, and she lied to him repeatedly. She also did not engage a private investigator and failed to file two motions he asked her to file -- thus, failing to keep her promises to him.

Judge Roman sought to clarify the scope of defendant's concerns, asking whether he correctly understood that Mouzis "hasn't filed specific motions" and "hasn't spoken with certain witnesses." Defendant responded: "She sent private investigator to do interviews, and she have fail to -- failed to represent me as with my best interest or do anything I need to do. And this -- I believe everything is in the motion that I did for the -- for the ground."

Judge Roman again tried to clarify: "So what you're indicating to me is, Judge, she hasn't filed specific motions, hasn't spoken with witnesses, hasn't completed an investigation, and doesn't have your best interests." Defendant responded that they "have a lot of problem talking," "have broken relationship," "can't communicate" and "never can sit down . . . and talk," "she not prepare" and "keep repeatedly lying to me," "everything I ask, it's never happen," and "she do not believe me on anything, and she believe that I will guilty on this, on the case." Judge Roman asked whether that covered everything, indicating he needed to speak with Mouzis. When defendant responded in the affirmative, Judge Roman asked Mouzis to respond.

Mouzis said the case was difficult and "as close to a death penalty case as it gets." She explained: "I take this case extremely seriously. It is not easy. It is over 8,000 pages. I have worked incredibly hard -- it's very difficult. One of the issues is we have about a hundred witnesses, but they have about 10 names that are used interchangeably.

So it's very difficult to even go through the transcripts and understand who's who. . . . It happened 20 years ago. So it has, I mean, I think understandably, taken a lot of time to do this. [¶] . . . [¶] I was on the right track when Mr. Nguyen went pro per, but he has the right to do so, and he did. [¶] So Mr. Nguyen knows this, but Mr. Nguyen's idea of instead of my notes on -- in terms of the defense and some of the discrepancies, was that we would make all the witnesses disappear. . . . I am a defense attorney, but I'm not a criminal. [¶] And so I refused to engage in the conversation that we will make witnesses disappear or so afraid they can't come to court. Mr. Nguyen then went pro per, I believe, based on what we talked about, in an attempt to gain information on those witnesses . . . [¶] [a]nd ultimately, had to come back to me because, obviously, you need to be an attorney to deal with this kind of case, and I'm more than willing to do so. I don't have a problem with hard cases or even clients who are not a fan of me . . . [¶] but I don't engage in that."

Mouzis further explained she was having trouble accessing a disk of the files transmitted back to her and needed to review several investigation files and any motions filed by defendant prior to trial. She said defendant never once asked her to file a motion, nor did she think any motions needed to be filed. Mouzis also clarified she did not hire an investigator because defendant had spent the entire $8,000 budget on an investigator during his self-representation and no further funds would be allocated, despite her requests. Mouzis brought her own private investigator to visits with defendant "because there [we]re certain intimations that there [we]re death threats, or something like that. Not because [she was] afraid, but because it [wa]s unnecessary to [her] representation."

Mouzis continued: "Mr. Nguyen has tried to get me to quit. He has -- he didn't want to come back from pro per status because he wanted a new attorney. But the fact is, I'm his attorney, and I think that I have done and am doing an extremely diligent job of representing him. I make the proper requests for discovery. I work with the prosecutor to make sure I have the information. I go to visit Mr. Nguyen when necessary for

updates. [¶] . . . [¶] So I understand that Mr. Nguyen is not personally a fan of me, and I appreciate that. A lot of people aren't. That's not the issue. The issue is whether I will and can competently represent him. I've indicated to him that I will and I can. He tried to get me to agree that I wouldn't, and I won't agree to that because that's not what I am about. I represent people. [¶] And so I -- I hear what Mr. Nguyen is saying, and I'll work with him, but quite frankly, he just doesn't want to work with me and that's okay. That's his choice. I've seen that. But I'm -- and that's what I have to say on this subject."

Judge Roman asked defendant if he had anything to add. Defendant said almost everything Mouzis said were lies, she repeatedly promised things and did not deliver, and she did not do things he asked her to do. He continued: "And if you force me to be with her, then you have to force me to go on pro per." Judge Roman responded: "This isn't that kind of a game, just so that we're clear. [¶] . . . [¶] . . . So don't do that." Finding insufficient grounds upon which to grant relief, Judge Roman denied the motion.

5

Marsden Four

The fourth *Marsden* hearing was held on November 4, 2016, again before Judge Roman. Judge Roman told defendant: "What I need you to do is raise the new issues that you indicated you have with your attorney." Defendant responded his new issues were that Mouzis lied to him and she had not completed the investigation. Judge Roman sought to clarify that those were the only reasons for the motion and defendant said those were "one of the reasons."

Judge Roman responded: "I need to know from you what your reasons are because every time I ask you a question it's 'well, yeah, but' -- so I need to know what all the reasons are. Okay?" Defendant added that he could not communicate with Mouzis, they did not have any trust between them, and he did not think he could go to trial with her. Judge Roman clarified that defendant's motion was based on three reasons then:

Mouzis lied to him, she had not completed the investigation, and he lacked trust in her. Defendant confirmed those were the only grounds for his motion.

Judge Roman denied the motion, explaining defendant raised the identical grounds found insufficient in the prior *Marsden* hearing.

B

No Marsden Error Occurred

1

General Principles

Under the Sixth Amendment to the United States Constitution, a defendant has the right to an adequate and competent defense; he does not, however, have the right to present a defense of his own choosing. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1162.) " 'When a defendant seeks substitution of appointed counsel pursuant to *People v. Marsden*, *supra*, 2 Cal.3d 118, "the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result." ' [Citation.] 'A trial court should grant a defendant's *Marsden* motion only when the defendant has made "a substantial showing that failure to order substitution is likely to result in constitutionally inadequate representation." ' " (*People v. Streeter* (2012) 54 Cal.4th 205, 230.)

"The decision whether to grant a requested substitution is within the discretion of the trial court; appellate courts will not find an abuse of that discretion unless the failure to remove appointed counsel and appoint replacement counsel would 'substantially impair' the defendant's right to effective assistance of counsel." (*People v. Roldan* (2005) 35 Cal.4th 646, 681.) An appellant is not entitled to relief from a *Marsden* error without a showing of prejudice. (*People v. Chavez* (1980) 26 Cal.3d 334, 348-349.)

Marsden error is reviewed for prejudice under the federal "beyond a reasonable doubt" standard. (*People v. Solorzano* (2005) 126 Cal.App.4th 1063, 1071, citing *Chapman v. California*, *supra*, 386 U.S. at p. 18 [17 L.Ed.2d at p. 705].)

2

No Inquiry Error Occurred

Defendant argues the trial court erred at each of the four *Marsden* hearings because, although the court allowed defendant to speak at each hearing, significant issues were neither explored nor resolved. The People disagree, arguing the court's inquiries were sufficient. We agree with the People.

When a defendant makes a *Marsden* motion, the trial court must "permit the defendant to articulate his causes of dissatisfaction and, if any of them suggest ineffective assistance, to conduct an inquiry sufficient to ascertain whether counsel is in fact rendering effective assistance. [Citations.] If the defendant states facts sufficient to raise a question about counsel's effectiveness, the court must question counsel as necessary to ascertain their veracity." (*People v. Eastman* (2007) 146 Cal.App.4th 688, 695.) However, an "inquiry into the attorney's state of mind is required only in those situations in which a satisfactory explanation for counsel's conduct or attitude towards his [or her] client is necessary in order to determine whether counsel can provide adequate representation." (*People v. Penrod* (1980) 112 Cal.App.3d 738, 747.) Further, a defendant's disagreement with the attorney's trial preparation and strategy does not trigger the duty of inquiry by the trial court. (*People v. Turner* (1992) 7 Cal.App.4th 1214, 1219.)

Marsden One: Defendant argues inquiry error occurred because "[t]here was no inquiry by Judge Winn as to when counsel might be ready to try [defendant's] case, as to the status of the investigator or the state of investigation, or as to what preparation remained to be done." We disagree. Judge Winn asked Mouzis to respond to defendant's concerns, and specifically asked her regarding her review of the transcripts,

the difficulties in locating the witnesses, whether she felt she could effectively and vigorously represent defendant, and whether a motion to dismiss was pending per defendant's request. Mouzis responded to all those questions. Additionally, Judge Winn was aware of Mouzis's motion to continue the trial date and the grounds for her request prior to the *Marsden* hearing, and he held the hearing on that motion immediately following the *Marsden* hearing. There was no need to address that issue during the *Marsden* hearing. Defendant was given a "full opportunity to air all of his complaints, and counsel to respond to them." (*People v. Smith* (2003) 30 Cal.4th 581, 606.) We perceive no abuse of discretion.

Marsden Two: Defendant argues inquiry error occurred because "no inquiry was made by the court as to the status of counsel's investigation and preparation, as to the time needed to prepare for trial, or as to why counsel was belatedly 'starting to review the discovery.' " We disagree. Judge Bowman asked Mouzis regarding the status of the case. Mouzis responded that, following her reappointment as defendant's counsel, she had met with defendant and the investigator and was trying to catch-up on the investigation and discovery done during defendant's self-representation because a lot had happened since she was relieved as counsel. It appears her statement regarding "starting to review the discovery" was in the context of the discovery done during defendant's self-representation. Given Mouzis's representation to the court that she was trying to figure out what investigation and discovery occurred during defendant's self-representation, and the fact that she had only been reappointed as defendant's counsel for a very short time, we perceive no abuse of discretion regarding the court's inquiry.

Marsden Three: Defendant argues error occurred because (1) "no inquiry was made by the court as to what witnesses had been interviewed, what investigation had been done, whether counsel had decided there was no viable defense, how counsel could have been 'on the right track' without having done investigation, and how the case could be prepared for trial with no funds for defense investigation," and (2) "[h]ad Judge

Roman been aware of [defendant's assertions in his written motion], inquiry would have been required to resolve these claims." We again disagree.

Dealing with defendant's second assertion first, we note defendant raised the same issues during the hearing as contained in his motion, that is, Mouzis had not filed specific motions, spoken to witnesses, and completed an investigation, she did not have his best interests at heart, continuously lied to him, and did not communicate with him, and their relationship was broken. Judge Roman asked Mouzis to respond to these contentions and she did. Mouzis explained the history of the case, her issues with getting up-to-date following her reappointment, the file review needed prior to trial, that she had requested additional funds for an investigator but the request was denied, and her continued commitment to providing defendant with quality legal representation. Again, we perceive no abuse of discretion because defendant was given a "full opportunity to air all of his complaints, and counsel to respond to them." (*People v. Smith*, *supra*, 30 Cal.4th at p. 606.)

Marsden Four: Defendant argues Judge Roman erred in denying the motion "without inquiry as to the status of preparation and counsel's estimate as to when she would be ready for trial, or without resolution of the identified lie, all of which was required by the court's duty of inquiry." We note defendant raised no new issues during this hearing before Judge Roman, who had considered defendant's same contentions during the *Marsden* Three hearing. Judge Roman asked defendant to list all of his reasons for bringing the motion, and defendant did. There was no duty to reconsider the identical grounds previously found insufficient; defendant was given adequate opportunity to fully air all of his grievances.

3

No Irreconcilable Conflict Shown

Defendant argues "[t]he circumstances here implicated both prongs of the disjunctive test identified in *People v. Welch* [1999] 20 Cal.4th [701,] 728: (i) trial

counsel was not providing adequate representation because she was not preparing for trial; and (ii) she and [defendant] had become embroiled in such an irreconcilable conflict that ineffective representation was likely to result." We address only the second contention because defendant fails to provide any argument with supporting facts and authority on the first contention; we therefore deem that argument waived or forfeited. (*People v. Bryant, Smith and Wheeler*, *supra*, 60 Cal.4th at pp. 363-364; *Nwosu v. Uba*, *supra*, 122 Cal.App.4th at p. 1246; Cal. Rules of Court, rule 8.204(a)(1)(C).)

Defendant argues his lack of trust in his counsel was sufficient to show "the conflict was likely to lead to ineffective representation." Not so. A claim of distrust of appointed counsel alone does not establish a conflict to the degree that counsel must be removed. (*People v. Jackson* (2009) 45 Cal.4th 662, 688.)

" '[T]he Sixth Amendment does not guarantee a " 'meaningful relationship' between an accused and his counsel." ' " (*People v. Clark* (1992) 3 Cal.4th 41, 100.) Dissatisfaction or conflict arising from defendant's own behavior or unfounded beliefs regarding counsel's competency does not create irreconcilable conflict. (*People v. Clark* (2011) 52 Cal.4th 856, 918 [defendant cannot refuse to cooperate with otherwise competent counsel and demand substitution]; *People v. Smith* (1993) 6 Cal.4th 684, 696 [a defendant may not manufacture a conflict by his own conduct to force the substitution of counsel].) " 'If a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination would obtain appointment of their preferred attorneys, which is certainly not the law.' " (*People v. Abilez* (2007) 41 Cal.4th 472, 489.)

As in *Cole*, " '[n]othing in the record here shows that [counsel] was incompetent or would not provide adequate representation if [s]he received defendant's cooperation.' [Citation.] Rather, defendant's complaints mostly show disagreement as to tactics, which, by itself, is insufficient to compel discharge of appointed counsel." (*People v.*

Cole (2004) 33 Cal.4th 1158, 1192.) "A trial court is not required to conclude that an *irreconcilable* conflict exists if the defendant has not made a sustained good faith effort to work out any disagreements with counsel and has not given counsel a fair opportunity to demonstrate trustworthiness." (*People v. Crandell* (1988) 46 Cal.3d 833, 860.)

Defendant relies almost exclusively on three federal cases -- *U. S. v. Walker* (9th Cir. 1990) 915 F.2d 480 (overruled on another ground in *U. S. v. Nordby* (9th Cir. 2000) 225 F.3d 1053, 1059), *U. S. v. Adelzo-Gonzalez* (9th Cir. 2001) 268 F.3d 772, and *United States v. Williams* (9th Cir. 1979) 594 F.2d 1258. None of those cases are analogous. Here, as in *Abilez*, "the alleged conflict between defendant and his defense counsel was not so serious that we must conclude communication between them had become so poisoned defendant was effectively denied his right to counsel." (*People v. Abilez*, *supra*, 41 Cal.4th at p. 491.)

In each of the federal cases upon which defendant relies, the district court failed to make any serious inquiry into an apparent irreconcilable conflict between the defendant and counsel that was brought to its attention. (*People v. Abilez*, *supra*, 41 Cal.4th at p. 491 [distinguishing *Walker* and *Adelzo-Gonzalez*]; see *U. S. v. Walker*, *supra*, 915 F.2d at pp. 482-483 [attorney said she and Walker were experiencing irreconcilable differences that were preventing her from representing him, and moved to withdraw, yet district court denied Walker's motion to substitute counsel without reading his letter and "made virtually no attempt to discover the causes underlying Walker's dissatisfaction with his counsel"]; *U. S. v. Adelzo-Gonzalez, supra*, 268 F.3d at pp. 777-779 [district court conducted only "perfunctory inquiries" to "determine the extent of the break-down in communication," despite "clear indications of serious discord and friction" between the defendant and his counsel where appointed counsel argued vigorously against the substitution motion, called the defendant a "liar," and according to the defendant, threatened to testify against him at trial and to " 'sink him for 105 years' "]; *United States v. Williams*, *supra*, 594 F.2d at pp. 1259-1261 [district court erred in summarily denying

substitution motion where counsel confirmed that "the course of the client-attorney relationship had been a stormy one with quarrels, bad language, threats, and counter-threats"].)

In contrast to the appointed counsel's actions in the federal cases, Mouzis did not join in defendant's *Marsden* motion and the antagonism in the attorney-client relationship stemmed from defendant alone. Mouzis said she had no personal conflict with defendant and said she would effectively and vigorously represent him. She explained their disagreements over tactical matters such as motions and witness information. The trial judges patiently entertained defendant's repeated requests to replace her as appointed counsel, and held repeated hearings at which they inquired of both defendant and Mouzis regarding the asserted bases for those requests. While defendant asserted during the *Marsden* hearings that Mouzis was lying in her statements to the court, the court was entitled to accept her explanation on the issue of credibility. (*People v. Smith*, *supra*, 6 Cal.4th at p. 696.)

As in *Smith*, "[d]efendant did not show that defense counsel did anything to cause any breakdown in their relationship. '[A] defendant may not force the substitution of counsel by his own conduct that manufactures a conflict.' " (*People v. Smith*, *supra*, 30 Cal.4th at p. 606.)

4

No Conflict Of Interest Shown

Defendant contends the trial court should have recognized a conflict of interest "at '*Marsden* One' and '*Marsden* Four' that counsel's inability to take [defendant's] case to trial reflected a decision to benefit other clients to [defendant's] detriment" and defendant's "assistance of counsel was impaired by counsel's commitment to trials in multiple other cases, which precluded her taking [defendant's] case to trial in a timely manner, all to [defendant's] detriment." He believes "if the court had made the inquiry

required by [*People v. Johnson* (1980) 26 Cal.3d 557], substitution of counsel would have been required." The People fail to address this argument.

We find no mention of a trial continuance or Mouzis's trial schedule during the *Marsden* Four hearing, and we disagree that the *Johnson* inquiry would have required substitution of counsel at the *Marsden* One hearing.

The inquiry discussed in *Johnson* was not in the context of a *Marsden* hearing. In that case, our Supreme Court considered whether the defendant's right to a speedy trial had been violated when the trial court granted the public defender's requests for continuances over the defendant's express objections. (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 561-562, 565-566.) "The postponements were not sought nor granted to serve the best interest of the defendant; they stem[med] from calendar conflicts of the public defender, and the decision of the public defender and the court to resolve th[o]se conflicts by trying other cases in advance of that of defendant." (*Id.* at p. 566.) Our Supreme Court explained that the right to a speedy trial may "be denied by failure to provide enough public defenders or appointed counsel, so that an indigent must choose between the right to a speedy trial and the right to representation by competent counsel." (*Id.* at p. 571.)

Our Supreme Court further explained: "The state cannot reasonably provide against all contingencies which may create a calendar conflict for public defenders and compel postponement of some of their cases. On the other hand, routine assignment of heavy caseloads to understaffed offices, when such practice foreseeably will result in the delay of trials beyond the 60-day period without defendant's consent, can and must be avoided. A defendant deserves not only capable counsel, but counsel who, barring exceptional circumstances, can defend him without infringing upon his right to a speedy trial." (*People v. Johnson*, *supra*, 26 Cal.3d at p. 572.)

Therefore, when a public defender or appointed counsel reveals that his or her representation of other clients create a conflict with the defendant, which he or she

proposes to resolve to the defendant's detriment, our Supreme Court said "the court should inquire whether the assigned [counsel] could be replaced by another [counsel] who would be able to bring the case to trial within the statutory period. In some instances, appointment of new counsel will serve to protect defendant's right to a speedy trial. If, on the other hand, the court cannot ascertain a feasible method to protect defendant's right, the court will have no alternative but to grant a continuance; upon a subsequent motion to dismiss, however, the court must inquire into whether the delay is attributable to the fault or neglect of the state; if the court so finds, the court must dismiss." (*People v. Johnson*, *supra*, 26 Cal.3d at pp. 572-573.)

Here, "the trial court was not required to make any specific inquiry in order to conclude reasonably that the appointment of new counsel for [defendant] only would lengthen, rather than shorten, the delay in bringing [defendant's] case to trial." (*People v. Sutton* (2010) 48 Cal.4th 533, 556.) The charges against defendant arose from two separate shootings almost two decades old. At the *Marsden* One hearing, Mouzis said she had gone through all the transcripts and explained, in detail, the complexities and confusion associated with witnesses having multiple Vietnamese and American names for purposes of reviewing those transcripts. Further, the continuance requested in the *Marsden* One hearing was brief. Indeed, the hearing was held on February 7, 2014, and Mouzis requested to continue the trial date from February 20, 2014, to April 17, 2014. The trial court scheduled a trial readiness conference for March 21, 2017.

Under these facts, the trial court could have reasonably concluded that the time required for the appointment of substitute counsel and for that counsel to review all the discovery, including the complexities regarding the transcripts, would have resulted in a delay in bringing defendant's case to trial. Further, "substitution is a matter of judicial discretion. Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would 'substantially impair' the

defendant's right to assistance of counsel."[11] (*People v. Webster* (1991) 54 Cal.3d 411, 435.) Defendant has failed to demonstrate such an impairment here. Additionally, the conflict complained of, i.e., the request for trial continuance, was not an "irreconcilable conflict" because it was one that could be and was resolved by the court's ruling on the issue.

DISPOSITION

The judgment is affirmed.

/s/
Robie, J.

We concur:

/s/
Raye, P. J.

/s/
Blease, J.

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11 We do not take lightly defendant's concerns regarding the delay in bringing him to trial, as stated in the *Marsden* One and *Faretta* hearings. We note, however, defendant did not raise a contention that the trial continuances resulted in a violation of his right to a speedy trial; and for good reason because defendant cannot show the requisite prejudice. (*People v. Johnson, supra*, 26 Cal.3d at pp. 574-575.) Prejudice may be demonstrated "by loss of material witnesses due to lapse of time or loss of evidence because of fading memory attributable to the delay" (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 911); however, defendant's flight for almost 17 years was the substantial cause of the delay. Additionally, defendant repeatedly waived time after the *Faretta* hearing and those periods are not included in calculating the length of the delay for purposes of determining if the delay was unreasonable. The brief continuance resulting from the hearing following *Marsden* One would hardly qualify as unreasonable delay considering the time subsequently waived by defendant. Moreover, any such claim would be disingenuous. At trial, defendant complained he did not have enough time to interview witnesses, and he did not want to go to trial because he was not ready.